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NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SEAN CLAUDE KELLY,<br><br>Defendant and Appellant. | C082063<br><br>(Super. Ct. No. 14F02340) |

After defendant Sean Claude Kelly shot two people, killing one, a jury found him guilty of second degree murder and attempted murder, and found several firearm enhancements true. On appeal, defendant contends the trial court erred in several respects: (1) in denying his request to present a gang expert; (2) in admitting evidence that he had been found with a gun five months before the shooting and that he had confronted the victim with a gun a week before the shooting; (3) in allowing a lay witness to offer expert opinion testimony regarding the shooting; and (4) in refusing to admit testimony regarding his state of mind. Defendant also contends insufficient evidence

supports his conviction for second degree murder and attempted murder. As to each of these contentions, we will affirm.

We separately asked the parties to address whether remand is appropriate in light of Senate Bill No. 620 and its amendments to Penal Code section 12022.53, subdivision (h).[1] (Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018.) The parties agree it is. We will remand so the trial court may consider exercising its discretion under section 12022.53, subdivision (h).

## I. BACKGROUND

Defendant shot the murder victim and his driver outside the garage of an in-home barbershop. The victim and driver pulled up to the garage in an orange car. The victim came out of the passenger side and as he walked up the driveway, defendant shot him multiple times. The driver, who was still in the car, was shot in the arm, and defendant continued to fire. With his arm "dislocated," the driver managed to put the car in drive and sped off. Defendant then ran across the street to his car. Defendant later called the barber and told him, "Don't say it was me."

At trial, defendant maintained that he shot the murder victim and driver believing they had guns. He testified that four to five days before the shooting, the victim had threatened his life. He knew the victim through mutual friends. Defendant knew the victim was a gangster with the Oak Park Bloods, knew he was violent, and had heard he had committed robberies, home invasions, and shootings.

Before the shooting, defendant had bought marijuana from the victim. When he discovered it was poor quality, he called the victim to ask for a refund. The victim initially resisted, but eventually said, "Yeah, we can do that." He said to call the next

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[1] Undesignated statutory references are to the Penal Code.

morning. They arranged to meet at an apartment complex. When defendant arrived, he saw 10 to 12 people with the victim.

The victim said the marijuana was fine and pocketed it, saying, "Since you don't want it, I take it." He told defendant to "Get up out of here." Someone drew a gun, and the victim said, "See, I got youngins that gonna get on you." The defendant took it as a death threat. Someone said, "No . . . not right here. They got the cameras right there." The person who pulled the gun said, "Next time I see you, I'm gonna smoke you." The victim then said, "The next time I see you, I'm gonna kill you." The victim then pointed to defendant's car and said, "This his car right here. . . . When you see this nigga, get on him." Someone said, "On Oak Park," which defendant took to mean they were Oak Park Bloods. Defendant got in his car and drove home.

At some point before the shooting, defendant went to the barber's house and bought a gun, "just in case."

The day of the shooting, he was at the barbershop garage. He carried the gun because he felt his life was in danger. He saw an orange car drive by, make a U-turn, and park in front of the driveway, blocking two cars in the driveway. Defendant saw the victim and someone else get out of the car. The victim walked up the driveway, locked eyes with defendant, and menaced a look of, "I got you. I got your ass." The driver stood outside the car and put his hands on the hood. Defendant thought he had a gun. He then saw the victim reach for something. Defendant jumped up and started shooting as fast as he could. Seeing the victim fall, defendant ran to his car and left.

The jury found defendant guilty of second degree murder (§ 187, subd. (a)) and attempted murder (§ 664/187, subd. (a)). As to both counts, the jury found defendant had personally discharged a firearm causing death (§ 12022.53, subd. (d)) and had personally discharged a firearm (§ 12022.53, subd. (c)).

The trial court imposed an aggregate indeterminate term of 72 years to life, consisting of a 15-year-to-life term for murder, along with a 25-year-to-life term for the

firearm enhancement, and a seven-year term for attempted murder, along with a 25-year-to-life term for the firearm enhancement.

## II. DISCUSSION

### *A. Gang Experts*

Defendant first contends he was denied his right to present a defense when the trial court prevented him from presenting a gang expert. We disagree.

#### *1. Background*

Mid-trial, a Sacramento deputy city attorney informed the court that the defense had subpoenaed two Sacramento police officers to testify. Neither officer was a witness in the case nor involved in the investigation. Defense counsel explained that the officers had unique knowledge of Sacramento gangs, and their testimony would be no different than if called by the People in a gang case. The prosecutor responded that the police department has an agreement with the district attorney's office to comply with subpoenas, but a similar agreement with the defense bar does not exist.

The city attorney noted a witness with no personal knowledge cannot be called as a non-retained expert witness. Agreeing, the court noted its impression was "you can't just pull someone off the street like that." Though it added, "I couldn't find anything on that point." The court quashed the subpoenas for the two officers.[2]

Defense counsel also sought to recall, as expert witnesses, two officers who had testified for the prosecution, Sergeants Quinn and MacLafferty. Counsel explained the sergeants had knowledge of Sacramento gangs including the Oak Park Bloods, "so [he] wanted to get into the fact that Oak Park Bloods is a criminal street gang recognized in the City of Sacramento. They have conducted numerous investigations of their violent behavior and violent acts, and get into the gang mentality with respect to this issue of

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[2] The trial court also questioned whether a discovery requirement might present an issue in that the witnesses were not disclosed prior to the discovery cutoff.

respect, retribution, and any number of things that only they can testify to because of their unique position with the Sacramento City Police Department."

The prosecution objected to Sergeant Quinn being recalled as an expert witness (though not as a percipient witness). The prosecutor explained, Sergeant Quinn's knowledge of the case was limited to transporting witnesses to homicide detectives and finding the murder weapon. The prosecutor allowed, however, that Sergeant MacLafferty had more personal knowledge of the case.

The court then asked defense counsel what Sergeant Quinn would testify to as a gang expert. Counsel responded, "I would just ask him general questions regarding the Oak Park Bloods, the dangerousness of that gang that he's familiar with." When the court asked what Sergeant Quinn had testified to that was expert in nature, counsel responded, "he testified that he was a gang expert," and "he was called out and he doesn't disregard his expertise."

The court denied the request to recall Sergeant Quinn as an expert—though he could be recalled as a non-expert—explaining Quinn "was not investigating the case or investigating a gang." But the court did allow the defense to recall Sergeant MacLafferty as an expert. The defense, however, recalled neither sergeant.

But earlier in the trial, when Sergeant MacLafferty was testifying as a witness for the People, defense counsel elicited from him on cross that the victim and the victim's brother were both validated gang members with Oak Park Bloods. Further, to a gang, respect could be more important than money. Showing a gun when confronted by a gangster is a sign of disrespect, which someone could get shot for. Retaliation could come from an individual gangster or those in his group. In gang culture, a gangster is expected to always carry a gun.

*2. Analysis*

On appeal, defendant contends he was denied his right to present a defense and argues the trial court erred in quashing the subpoenas. He maintains it was not for the trial court to decide which witnesses the defense could use.[3] We find no error.

Defendant was not denied his right to present a defense. He sought to offer evidence of gang culture and how a gang member who felt disrespected might react. The trial court did not prevent this—indeed the jury heard such evidence.

The trial court did, however, require the defense to comply with the law regarding expert witnesses. A defendant may not compel a witness with no connection to the case, to testify as a non-retained expert witness. (*People v. Barnes* (1931) 111 Cal.App. 605, 609 [a party cannot impose upon an unwilling witness the duty to form and give an expert opinion]; see also *Agnew v. Parks* (1959) 172 Cal.App.2d 756, 764 ["there is no duty on a doctor's part to agree to serve as an expert witness for one with whom he has no pre-existing contractual relationship"].) By contrast, a percipient witness may be called to testify and without special compensation. (See *McClenahan v. Keyes* (1922) 188 Cal. 574, 583 ["a physician who has acquired knowledge of a patient or of specific facts in connection with the patient may be called upon to testify to those facts without any compensation other than the ordinary witness receives for attendance upon court"].)

Here, the two subpoenaed officers had no connection to the case. The trial court, thus, properly quashed their subpoenas. Further, Sergeant Quinn did testify for the prosecution, but his role was minimal. Defendant has not shown the trial court's decision not to allow Quinn to be recalled as an expert was error. And, of course, defendant was

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[3] Defendant also challenges the quashing as a preclusion sanction. But as discussed below, the trial court did not quash the subpoenas as a punitive measure for late disclosure. It did so because the defense may not subpoena non-retained expert witnesses with no connection to the case.

permitted to recall Sergeant MacLafferty as an expert but opted not to do so. Defendant's first contention thus fails.

*B. Character Evidence*

Defendant next challenges the admission of evidence that he had shown a gun in a confrontation with the victim a week before the shooting and that he was found with a gun five months before the shooting. He argues it was irrelevant to the present charges, constituted character evidence, and was inadmissible under Evidence Code section 1103, because in neither circumstance was a weapon presented for assaultive purposes nor used to facilitate the commission of a crime. He also argues neither episode was relevant to his character for violence. We disagree.

*1. Background*

Defendant moved in limine to exclude evidence that a week before the shooting, he lifted his shirt to display a gun, as well as evidence that he had been found with a gun five months before the shooting. The trial court denied both requests, concluding if defendant opens the door, the prosecution may bring in the evidence under Evidence Code section 1103, subdivision (b).[4]

Later in the trial, an acquaintance of the victim testified that a week or two before the shooting, she was outside the victim's apartment, along with her nieces and nephews, the victim, his brother, and two others. She saw defendant tell the victim the marijuana he bought was no good and he wanted his money back. The victim said some of the marijuana was missing and refused to refund defendant's money. The victim and others with him laughed at defendant—but the acquaintance testified it was "not really hostile." They said, "you're crazy. You're not getting your money back."

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[4] In arguing the motion, defense counsel conceded the evidence of defendant displaying a gun to the victim should come in.

Defendant lifted his shirt, showing a gun. Someone with the victim lifted his shirt to show he, too, had a gun. Defendant left but said, "I'll be back. I'll be back." Defendant did not look scared.[5]

The acquaintance also testified that defendant had a reputation for pulling out a gun before fighting. On cross, she agreed that she knew both the victim and his brother were Oak Park Bloods.

Defendant in turn testified to a gun found in his car. He had driven to Sierra College for a final exam and left a jar of marijuana in the backseat. When an officer saw it, defendant was called from class, his car was searched, and a gun was found under the driver's seat.

Defendant testified that he had owned the gun for over year. When asked why he bought it, he said, "Um, stupid. That's probably why I got caught with it because I was stupid, and I didn't need it." When asked why he had not put the gun in the trunk, he answered, "I can't explain that." He denied needing the gun accessible as a marijuana dealer, in case someone tried to rip him off.

*2. Analysis*

Evidence Code section 1103 permits the prosecution to offer evidence of a defendant's character for violence if the defendant first offers evidence that the victim had a character for violence. (Evid. Code, § 1103, subd. (b).)

Here, defendant offered evidence of the victim's violent character, testifying that the victim was a violent gangster, had been involved in robberies, home invasions, and shootings, and had threatened to kill defendant.

That evidence opened the door to evidence of defendant's character for violence. Evidence that he lifted his shirt to show a gun after a refund was refused indicated a willingness to resort to violence to settle disputes. Similarly, keeping a gun under his

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[5] Defendant testified that the acquaintance was not there, nor were any children.

driver's seat indicated propensity for violence—particularly given defendant's failure to offer an explanation for having the gun at the ready.

As such, the trial court acted within its discretion in admitting the evidence pursuant to Evidence Code section 1103, subdivision (b). (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1118 [overruled objection to character evidence is reviewed for abuse of discretion].)

*C. Lay Witness Opinion*

Defendant next contends the trial court erred in allowing a lay witness to offer expert opinion regarding the shooting of the victim. The People do not argue the testimony was properly admitted, but maintain any error was harmless. We agree any error was harmless.

*1. Background*

Over the defense's objection, a witness, who had arrived just after the shooting, testified that based on the empty shell casings around the victim's body, the victim appeared to have been shot at point blank range. The witness explained, "I'm a hunter, and I have guns, and I understand how guns operate. And if you shoot a gun here, the shell casings are going to drop right around you. [¶] If you're standing in front of someone, they're going to drop—and I'm not an expert. I just am trying to put it together in my mind. It seemed like it was at point blank range."

On cross, he was asked: "with respect to point blank range and shell casings located, wouldn't you say it would be better to leave that to experts, ballistic experts to testify about that?" The witness answered, "Of course." Defense counsel then asked, "You know shell cases on automatics generally eject to the right?" The witness responded, "I really didn't think of it. Sure." Counsel continued: "And you know that that bullet doesn't hit the person firing the gun because those things are hot?" The witness responded, "Absolutely." The witness also agreed he had not conducted any

studies regarding how far shell casings fly or what they could bounce off of. He added "there are other people that are better off, you know, determining all this stuff than I am."

Later, a criminalist was asked on cross if, in his expertise, he could determine the shooting was point blank from the casings' locations. The criminalist said, "No." When asked if it was impossible to make such a determination, he said, "[n]ot from the shell casings." Defense counsel continued, "[t]he reason you can't tell if a shooting was point[ ]blank or not is because shell casings hit things, bounce off things. They go all over the place." The criminalist agreed, "Absolutely, yes,"

*2. Analysis*

Under Evidence Code section 800, a non-expert witness may testify to an opinion if it is rationally based on his perception as a witness and helpful to a clear understanding of his testimony. We will assume without deciding that overruling defense counsel's objection was error. It was nevertheless harmless.

Shortly after opining that the victim was shot point blank, the witness walked back that conclusion. He admitted, "there are other people that are better off . . . determining all this stuff than I am," and acknowledged he had failed to consider that casings eject to the right, or that they might fly some distance and bounce off things.

Were that not enough to render the error harmless, a subsequent expert witness's testimony established that it is not possible to determine the shooter's location based on the casings on the ground. As such, any error was harmless.

*D. Defendant's State of Mind*

Defendant next challenges the trial court's refusal to admit testimony regarding his state of mind. We find no error.

*1. Background*

While defendant was testifying, his attorney asked about the victim's twin brother: "[D]o you know his brother, the twin?" Defendant answered, "Yes, I do." When his

counsel asked, "what did you know about his reputation?" the trial court sustained an objection on relevance grounds.

Outside the jury's presence, defense counsel argued the victim's brother's reputation for violence was relevant because the victim and his twin brother were both validated Oak Park Bloods, and defendant knew about the brother's reputation. Asked how that was relevant to a disputed fact, defense counsel responded, "Just [defendant's] fear of the Oak Park Blood street gang . . . is relevant to his self-defense." The court continued to sustain the objection, given the brother was not present the day of the shooting and the evidence did not show it was a gang crime.

*2. Analysis*

Defendant challenges that ruling on appeal, arguing his belief that the victim's brother had a reputation for violence was relevant to his state of mind when he shot the victim. The testimony would have informed the jury on what he based his fear and that his fear was reasonable.

Unless excluded by statute or state Constitution, "all relevant evidence is admissible." (Evid. Code, § 351; *People v. Howard* (2010) 51 Cal.4th 15, 31.) "Evidence is relevant if it 'ha[s] any tendency in reason to prove or disprove any disputed fact.' " (*Howard, supra,* at p. 31.) But "[t]he trial court has broad latitude in determining relevance." (*Ibid*.) Its determination is reviewed for abuse of discretion. (*Ibid*.) An abuse of discretion is found "where a court acts unreasonably given the circumstances presented by the particular case before it." (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 502-503.)

Here, while we might have ruled differently, we cannot say the trial court acted unreasonably in concluding the victim's brother's reputation for violence had no tendency in reason to prove or disprove a disputed fact given the brother's minimal connection to the case.

Even assuming arguendo the ruling was error, the fact that the jury heard multiple references to the brother being an Oak Park Bloods gang member—and that the jury heard multiplicitous reference to *the victim's* reputation for violence, including past crimes, gang membership, and defendant's fear of him—renders the ruling harmless.

*E. Insufficient Evidence*

Finally, defendant contends insufficient evidence supports his conviction for second degree murder and attempted murder. He argues he acted in self-defense, in that the victim, a gang member, had threatened him the week before the shooting. When the victim exited the car, defendant shot him thinking he was armed and was about to avenge the perceived slight. Because defendant had an honest and reasonable belief that the victim was going to carry out his threat, he acted in self-defense. Moreover, having acted in self-defense, the doctrine of transferred intent also renders the shooting of the driver a legally justified act of self-defense. He further argues that if he had an honest but unreasonable belief it was necessary to defend himself, that belief still reduces the conduct to manslaughter. We disagree.

" 'When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Gomez* (2018) 6 Cal.5th 243, 278.) We presume the existence of every fact reasonably deduced from the evidence in support of the judgment. (*Ibid*.)

Here, substantial evidence supports the convictions for second degree murder and attempted murder. Defendant indisputably shot the victim several times, killing him, and shot the driver. The record offers evidence from which a jury could reasonably reject defendant's assertion he acted in self defense. The acquaintance testified defendant's life was not threatened when he was refused a refund. Rather, it was defendant who first

displayed a gun and said, "I'll be back. I'll be back." And there was evidence of defendant's own reputation for violence.

Thus, a jury could reasonably conclude defendant did not act in self-defense.

*F. Firearm Enhancements*

We asked the parties to brief whether remand is appropriate in light of Senate Bill No. 620. The parties agree it is.

Prior to January 1, 2018, an enhancement under section 12022.53 was mandatory and could not be stricken in the interests of justice. (See former § 12022.53, subd. (h); Stats. 2010, ch. 711, § 5; *People v. Felix* (2003) 108 Cal.App.4th 994, 999.) Senate Bill No. 620 amended section 12022.53, subdivision (h) to permit the trial court to strike firearm enhancements imposed under section 12022.53. Under the new provisions, "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h); Stats. 2017, ch. 682, § 2.)

Senate Bill No. 620 applies retroactively. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [remanding pursuant to the amended section 12022.53]; see also *In re Estrada* (1965) 63 Cal.2d 740, 744.) Here, the amendment took effect before defendant's conviction becomes final; therefore, Senate Bill No. 620 applies retroactively to him. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306.)

We agree with the parties that remand is appropriate so the trial court may consider exercising its discretion to strike the firearm enhancements. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 ["Remand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so"].)

## III. DISPOSITION

We remand to allow the trial court to consider exercising its discretion under section 12022.53, subdivision (h). The judgment is otherwise affirmed.

/S/

RENNER, J.

We concur:

/S/

MAURO, Acting P. J.

/S/

HOCH, J.